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Massachusetts Oilheat Council, Inc. and ) D.T.E. 00-57  
Massachusetts Alliance for Fair Competition )  
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## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

### I. INTRODUCTION

On June 29, 2000, the Massachusetts Oilheat Council and the Massachusetts Alliance for Fair Competition (together, the "Complainants") filed a complaint and petition (the "Complaint/Petition") with the Department of Telecommunications and Energy (the "Department") requesting that the Department suspend implementation of the Value Plus Installer Program ("VPI Program"), which was recently instituted by Boston Gas Company, Colonial Gas Company and Essex Gas Company (together, the "Companies"), until the Department has had the "opportunity to investigate and issue a ruling on this complaint/petition" (Complaint/Petition at 2).

The Complaint/Petition is deficient and should be dismissed because: (1) the facts alleged by the Complainants do not support the claims that the Companies' promotional activities will "impair the competitive marketplace;" (2) the Complainants have failed to provide any reasoned basis to warrant further investigation by the Department of issues relating to ServisEdge Partners, Inc. ("ServisEdge") and the pending merger with KeySpan Corporation ("KeySpan"); and (3) the Complaint/Petition fails to allege any violation of a regulation or statute that would present an actionable legal claim to the Department. (1) Accordingly, the Department should dismiss the "complaint/petition" without further action.

### II. STANDARD OF REVIEW

The Department articulated its standard of review for ruling on a motion to dismiss in *GasLantic Corporation*, D.P.U. /D.T.E. 96-101 (1999), citing *Riverside Steam & Electric Company*, D.P.U. 88-123 (1988). See also *Interlocutory Order on Motion to Dismiss of the New England Cable Television Association, Inc.*, D.P.U. 94-50, at 32 (February 2, 1995). In determining, under that standard, whether to grant a motion to dismiss for failure to state a claim upon which relief can be granted, the Department takes the assertions of fact included in the filings and pleadings as true and construes them in favor of the non-moving party (in this instance, the Complainants). *Cambridge Electric Light Company*, D.P.U. 94-101/95-36, at 11 (1995), citing *Riverside* at 26-27. Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. *Id.*

### III. THE COMPLAINT FAILS TO PROVIDE A BASIS FOR DEPARTMENT ACTION

A. There Is No Basis for the Department To Order the Companies To Discontinue Their  
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## Promotional Programs

The Complainants have advanced a number of theories as to the ways in which the VPI Program and other promotional activities of the Companies will "impair the competitive marketplace" (Complaint/Petition at 2). Specifically, the Complainants claim that: (1) the use of a "special contractor list;" (2) the offer of free heating equipment; (3) the "subsidization" of contractor advertising; and (4) interference in the competitive market for equipment sales and installation service, are "manipulative and anti-competitive practices" that will harm competitive energy choice and the heating, ventilation and air conditioning ("HVAC") market (id. at 27). Even if the facts alleged are taken as true, i.e., that the Companies will maintain "preferred contractor lists;" that the Companies will offer free equipment to customers; and that the Companies will provide incentives for cooperative advertising to participating contractors, the Complainants have failed to assert a basis for Department action, and therefore, are not entitled to relief.

It is well established that natural-gas companies do not have a monopoly in the energy-services area, and therefore, must compete with home-heating oil and other energy providers for the opportunity to serve the needs of customers. Indeed, G.L. c. 164, § 33A specifically permits rate recovery of costs relating to LDC promotional activities that:

stimulate the use of products or services which are subject to direct competition from products or services or entities not regulated by the [D]epartment or any other governmental agency.

Accordingly, the conversion of customers to gas service is a legitimate business objective of the Companies, and in that regard, the Complainants are correct that the primary goal of the VPI Program and free-equipment offers is to "spur conversions" from alternative fuels to gas (id. at 20). The Department has consistently supported gas company efforts to increase the sale of natural gas and to provide useful information for the benefit of customers through various promotional activities similar to those that are the subject of this Complaint/Petition. See, e.g., Boston Gas Company, D.P.U. 93-60, at 51-57 (1993) (allowing cost recovery for two rebate programs for customers who install gas air conditioning and gas cogeneration equipment); Boston Gas Company, D.P.U. 93-60, at 164-165 (1993) (allowing cost recovery for advertisements listing local plumbing vendors, which provide customers with useful information on who to contact for installation of the Company's service); Bay State Gas Company, D.P.U. 92-111, at 201-202 (1992) (acknowledging that promotional rebate program may be beneficial to ratepayers); The Berkshire Gas Company, D.P.U. 90-121, at 133 (1990) (promotional advertising must leave the reasonable impression that a non-regulated energy source is the target of the advertisement in order to qualify for cost recovery). Thus, it is significant that the Complainants have failed to offer any indication to the Department as to the particular statute, regulation or Department precedent under which they would be entitled to relief, i.e., the Complainants have not provided the Department with a basis to conclude that the Companies should or could be precluded from engaging in such promotional activities.

In fact, underlying all of the rhetoric and convoluted analysis offered up in the Complaint/Petition is the reality that the Complainants seek one objective: to use the Department as a forum to obtain protection from the competition that will stem from the Companies' marketing efforts. As a result, the Complainants are unable to specify an actionable legal claim, and instead, must rely upon the Department's stated "commit[ment] to bringing the benefits of competition to all utility consumers" in support of their claims (Complaint/Petition at 26). The Department should not countenance the Complainants' attempts to mischaracterize the Department's policy objectives in encouraging an open and competitive marketplace in Massachusetts.

To that end, the Department has consistently stated that "in developing our vision of the restructured industry, the Department seeks to foster the benefits of

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competition itself rather than to protect individual competitors" See, e.g., Electric Restructuring, D.P.U. 96-100, at 13 (1996). Moreover, the Department has emphasized that its role in promoting competition should not be misconstrued as one of insulating other market participants from competition:

Our role is not to guarantee the success of entrants. Rather, our role is to put in place the structural conditions necessary for an efficient competitive process. . .

Massachusetts Gas Unbundling, D.T.E. 98-32-B at 30 (1999) (emphasis added).

The Department has affirmed this long-established precept stating that it has "consistently rejected attempts over the years to make some customers and competitors better off at the expense of others, all in the name of promoting competition." MCI WorldCom, D.T.E. 97-116-C, at 35 (1999). As unregulated energy providers, the Complainants are free to undertake marketing campaigns that "create an army of little advertisers who will tout the benefits and advantages" of heating oil to the exclusion of all other product and services (see Complaint/Petition at 24). This is the nature of the competitive market. Rather than participating in an open and competitive process, however, the Complainants seek to hide under the wing of the Department by obtaining unfair and unwarranted protection from competition.

In the absence of specific reference to a statute or regulation that would provide a basis for the Department's action, the Complainants rely solely on general claims that the Companies' marketing efforts "impair the competitive market" and effectively constitute antitrust claims. Even if the facts, as alleged, supported a claim of antitrust violations, which they do not, such claims are more properly addressed in a court of suitable jurisdiction. That is, because the unspecified and unsupported legal claims of competitors seeking protection from alleged "anti-competitive" practices would require a broad investigation of facts and law beyond the scope of the Department's expertise and resources, the Department has consistently refrained from engaging in such an exercise.

For instance, in response to accusations of unfair and anti-competitive pricing by Bay State Gas Company in relation to its appliance rental program, the Department held that such charges should be brought in court, not to the Department.

As to whether the prices charged by the Company for appliance rental activities are injurious to potential competitors, and violate laws or statutes dealing with anti-competitive behavior, the Department notes that such determinations may be more appropriately addressed in the courts that are charged with reviewing commercial conduct in light of such provisions.

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If the Department were to undertake to scrutinize a utility's unregulated activities to ensure compliance with applicable trade laws, the added responsibility would encompass a wide range of company activities. . . . Accordingly, the Department does not find it appropriate in this case to engage in judicial determinations of anti-competitive behavior regarding the pricing of the Company's retail program services . . .

\* \* \*

The Department finds that such determinations would not be appropriate under the Department's statutory mandate.

Bay State Gas Company, D.P.U. 89-81, at 76-77 (1989) (emphasis added). The Department reached the same conclusion in the context of promulgating standard of conduct regulations to govern affiliate transactions. There, the Department stated

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that complaints concerning the alleged abuse of market power by utilities in non-monopoly activities should not be undertaken through the Department's Standard of Conduct regulations, 220 C.M.R. 12.00 et seq.

If a competitor complains that such market power does, in fact, exist, these regulations [220 C.M.R. 12.00 et seq.] do not displace State or Federal anti-trust law, which would be the more appropriate means to redress any valid complaints.

Standards of Conduct, D.P.U./D.T.E. 97-96, at 24 (1998) (emphasis added). Notably, the Massachusetts Oil Heat Council ("MOC") has previously acknowledged that anti-trust determinations must be made by a court of law. Boston Gas Company, D.P.U. 96-50, at 330 (Phase I) (1996) (MOC contended that Boston Gas was engaging in predatory pricing and conceded that "this determination will have to be made by a court of law").

The Complainants have failed to allege a violation of, or even to make specific reference to, any statute or regulation upon which the Department could support and sustain an order to discontinue the VPI Program and promotional activities. In addition, it is well-established Department policy to refrain from the adjudication of anti-trust and related claims of anti-competitive behavior, especially where such claims seek to protect competitors rather than to encourage the operation of competitive forces. Because the Complainants fail to state a basis upon which they would be entitled to the requested relief, the Complaint/Petition should be dismissed without further action by the Department.

B. The Complainants' Allegations Regarding the Participation of ServisEdge in the VPI Program Do Not Warrant an Investigation by the Department.

The Complainants request relief from the Department in the form of an investigation into whether the VPI Program "will unduly and unfairly benefit ServisEdge" (Complaint/Petition at 4). However, the Complaint/Petition provides no factual or legal basis to warrant such an investigation, and therefore, the Department should deny the requested relief.

The Complainants allege that ServisEdge is the largest provider of HVAC service and equipment installation in the Commonwealth, and therefore, the Complainants "question" whether ServisEdge will receive the "greatest amount of funds" for free equipment, cooperative advertising, specialty training, market leads, or trade ally attention (Complain/Petition at 9). The Complainants further speculate that, if so, "such diversion of utility revenue" would "circumvent the Department's affiliate separation policy. . . ." (id. at 9-10). Even if the Complainants' allegations regarding ServisEdge were factually based (and the Companies do not concede that they are), the Complainants are not entitled to the requested relief because, as described below, the alleged facts do not constitute a basis for Department action.

As noted by the Complainants, the Department has encouraged "corporate separation" as an "effective solution" to the problem of anti-competitive transactions, and one that requires less regulatory supervision (see, Complaint and Petition at 9, citing, Letter to Bay State Gas Company, October 25, 1999). ServisEdge is a separate corporate entity within the organization of Eastern Enterprises, and has been a separate corporation for approximately three years. The Department has already considered the potential for preferential treatment of a competitive affiliate by a utility, and to address this issue, has promulgated standards of conduct, which govern the relationship between ServisEdge and its affiliates, Boston Gas, Colonial Gas and Essex Gas (see 220 C.M.R. 12.00 et seq.).

The Complainants have alleged no facts or legal basis supporting a claimed violation of the Standards of Conduct - nor could they. The mere participation of ServisEdge in the program is not enough to sustain a claim that the Companies are in violation of the Department's regulations. The Complainants allege only that the "potential" exists for undue preference, which is not sufficient basis for Department action, especially where the affiliate is organized as a separate and distinct corporate

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entity and where the Department has acted to promulgate specific codes of conduct to govern its relationship with the regulated utility.

Moreover, even if the Complainants had alleged actual violations of the Department's standards of conduct, such allegations cannot be heard by the Department before the Complainants first fulfill their obligation under 220 C.M.R. 12.03(18) to enter into a dispute-resolution procedure with the Companies. Pursuant to 220 C.M.R. 12.03(18), a distribution company's dispute-resolution procedure designates the person responsible for conducting an investigation of complaints alleging violations of the Department's standards of conduct. The Department's regulations require that the neutral person:

communicate the results of the investigation to the claimant in writing within 30 days after the complaint is received; and require that such communication describe any action taken and notify the complainant of his or her right to complain to the Department if not satisfied with the results of the investigation.

220 C.M.R. 12.03(18) (emphasis added). The Complainants have not initiated a dispute-resolution procedure with the Companies. Accordingly, the Complaint/Petition should be dismissed because the Complainants have failed to identify a legal claim upon which relief could be granted, and to the extent that the standards of conduct could be implicated, the Complainants have failed to follow required procedures involving dispute resolution with the Companies before filing the Complaint/Petition with the Department.

C. The Complainants' Allegations Regarding the Pre-Merger Relationship Between Boston Gas and KeySpan Do Not Warrant an Investigation by the Department.

The Complainants request relief from the Department in the form of an investigation of the Company's pre-merger relationship with Keyspan concerning the VPI Program (Complaint/Petition at 4). Here again, the Complaint/Petition provides no factual or legal basis in support of the initiation of such an investigation. The Complaint/Petition is silent on any legal impropriety associated with Boston Gas' pre-merger discussions concerning the VPI Program with Keyspan or any other third party. Accordingly, the Department should deny the requested relief.

IV. THE COMPLAINANTS' ALLEGATIONS FAIL TO STATE AN ACTIONABLE LEGAL CLAIM BEFORE THE DEPARTMENT.

The Petition establishes no legal justification or jurisdictional basis for the Department to initiate an investigation on any allegation contained in the Complaint/Petition. Even if all of the facts alleged by the Petitioners are accepted as true, which the Companies have not conceded (and would dispute in any proceeding initiated by the Department), the facts fail to constitute a cause of action upon which the Department could base the requested relief. Completely absent from the Complainants' 31-page Complaint/Petition is reference to any statutory authority under which the Complaint/Petition could be based. The failure to state such authority directly violates the Department's procedural requirement that every initial pleading contain "[a] reference to the statute under which relief is sought." 220 C.M.R. 1.04(1)(b)7. Indeed, not only is any reference to the statute under which relief is sought missing from the Complaint/Petition, it is difficult, if not impossible, to discern the legal nature of the allegations being made by the Complainants against the Companies. A short description of each allegation included in the Complaint/Petition demonstrates either the absence of required Department statutory authority or other legal basis for the claim, as well as the lack of a reasoned basis for Department action.

Point A The VPI Program Does Not Discriminate Against the Existing Gas Heat Customers of the Utility

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The Complainants claim the VPI Program results in undue discrimination among Boston Gas' retail customers (Complaint/Petition at 7). The Complainants, however, lack the legal authority to represent the Company's customers. See Order on Motion for Partial Summary Judgment and Motion to Dismiss, D.P.U. 86-209, at (May 8, 1990) (Department grants motion to dismiss petition because, among other things, petitioner was not entitled to assert rights of a third party); New England Telephone and Telegraph Company, D.T.E. 98-15 (Phase I-A), at 10, ftnt.3 (1999) (Department finds AT&T makes the equivalent to a *jus tertii* argument, which it has no standing to advance on behalf of others); G.L. c. 40A, § 10; see also Tax Equity Alliance For Massachusetts v. Commissioner of Revenue, 423 Mass. 708, 715 (1996) (it is a well-established legal principle in the Commonwealth that only persons who have themselves suffered harm can compel review); *Save the Bay v. Department of Public Utilities*, 366 Mass. 667, at 672 (a party must meet the legal requirements necessary to confer standing). Accordingly, this Complaint/Petition should be dismissed.

Point B There Is No Basis for the DTE To Investigate Whether the VPI Program Will Unduly Benefit the Company's Affiliate ServiceEdge to the Detriment of the Marketplace

The Complainants' underlying claim is that the VPI Program "may" be used to circumvent the Department's affiliate separation policy by providing ServiceEdge with utility revenues to undertake and perform installation work (Complaint/Petition at ¶ 18). This speculative claim fails to identify a present violation of any relevant statute or Department regulation. Moreover, the relationship between ServiceEdge and the Companies is governed by the Department's standards of conduct, which require the Complainants first to enter into a dispute-resolution process with the Companies prior to seeking relief from the Department (see 220 C.M.R. 12.04(18)). Accordingly, this Complaint/Petition should be dismissed.

Point C There Is No Basis for the DTE To Order Boston Gas To Discontinue the VPI Program and Prohibit the Use of Contractor Lists in any Promotional Program

The main element of the Complainants' claim is that the use of a preferential contractor program and referral list constitutes anti-competitive, if not anti-trust, violations (Complaint/Petition at ¶ 24). As described above in Section III.A, the Complainants have failed to allege a specific statute or regulation under which the Department could grant the requested relief. Moreover, it is contrary to well-established policy for the Department to engage in an investigation of general assertions of anti-competitive behavior, and therefore, such claims should be brought before courts of appropriate jurisdiction, rather than before the Department. Accordingly, this Complaint/Petition should be dismissed.

Point D There Is No Basis for the Department To Order Boston Gas To Immediately Discontinue its Free Heating Equipment Program

According to the Complaint/Petition, the Companies' offer of free heating equipment to residential customers constitutes a form of price fixing, and will effectively constrict and control the wholesale price for residential heating equipment (Complaint/Petition at ¶¶ 36, 41). As described above in Section III.A, the Complainants have failed to allege a specific statute or regulation under which the Department could grant the requested relief. Moreover, it is contrary to well-established policy for the Department to engage in an investigation of general assertions of anti-competitive behavior. The Department has indicated that such claims should be brought before courts of appropriate jurisdiction, rather than before the Department. Accordingly, this Complaint/Petition should be dismissed.

Point E There Is No Basis For a Finding That Boston Gas Co-Op Advertising Program Is Anti-competitive and Should Be Discontinued

Although the Complainants acknowledge that they have no indication of what the content of the VPI Program's advertisements will look like, the Complainants allege that the advertisements "will be designed to blur the distinction between the

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utility and the independent contractor" (Complaint/Petition at ¶¶ 51, 52). As described above in Section III.A, the Complainants have failed to allege a specific statute or regulation under which the Department could grant the requested relief. Moreover, it is contrary to well-established policy for the Department to engage in an investigation of general assertions of anti-competitive behavior, and therefore, the Department has indicated that such claims should be brought before courts of appropriate jurisdiction, rather than before the Department. Accordingly, this Complaint/Petition should be dismissed.

#### Point F The DTE's Policy Favoring Competition Is Not Undermined by the Boston Gas VPI Program

The Complainants allege that the VPI Program includes anti-competitive practices (e.g., the establishment of a special contractor list) that will harm competitive energy choice and the HVAC marketplace (Complaint/Petition at ¶ 57). As described above in Section III.A, the Complainants have failed to allege a specific statute or regulation under which the Department could grant the requested relief. Moreover, it is contrary to well-established policy for the Department to engage in an investigation of general assertions of anti-competitive behavior, and therefore, the Department has indicated that such claims must be brought before courts of appropriate jurisdiction, rather than before the Department. Lastly, the Department has consistently emphasized that its role in promoting competition should not be misconstrued as requiring the artificial protection of other market participants. Accordingly, this Complaint/Petition should be dismissed.

#### Point G There Is No Basis for the DTE To Investigate the Pre-Merger Relationship Between Boston Gas and Keyspan

According to the Complaint/Petition, although the petitioners do not at this time challenge the proposed merger between Eastern and Keyspan, the Complainants request that the Department "investigate whether Boston Gas engaged in any improper pre-merger activity practices, including the sharing of information, data, materials and personnel in establishing and marketing the VPI Program" (Complaint/Petition at ¶ 59). There is no legal basis for this requested relief and the Complainants fails to identify a violation of any statute or Department regulation that would serve as that basis. Accordingly, this Complaint/Petition should be dismissed.

#### Point H There Is No Basis for the DTE To Order Boston Gas and all Other Utilities To Provide Potential Conversion Customers With a Payback Analysis

Acknowledging that the VPI promotional materials have not yet been released, the Complainants nevertheless assert that "[t]here is no reason to believe the upcoming VPI media blitz will be free of [customer savings] representations" (Complaint/Petition at ¶ 60). The Complainants urge the Department "to order all utilities who promote conversions to natural gas to provide the consumer with an analysis generally disclosing the payback period for the costs associated with undertaking such a conversion" (id.). This allegation is speculative and fails to assert any statutory or regulatory basis for Department action. Moreover, the Department has found that such allegations should be brought in court under traditional consumer protection statutes and regulations.

Existing state and federal laws that regulate advertising offer remedies for fraudulent or deceptive advertising. These laws offer adequate protection.

Standards of Conduct, D.P.U./D.T.E. 97-96, at 23-24 (1998). Accordingly, this Complaint/Petition should be dismissed.

#### Point I There Is No Basis for the Department To Order Boston as To Suspend Implementation of the VPI Program Pending the DTE's Investigation

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This argument fails to raise any specific allegation against the Companies. Instead, it requests the Department to issue an interim order directing Boston Gas to suspend implementation of the VPI Program pending the Department's proceeding in this matter (Complaint/Petition at ¶ 63). For all of the reasons described in this Memorandum, the Companies' Motion to Dismiss should be granted. Accordingly, an interim order suspending implementation of the VPI Program would be moot. (2)

#### V. CONCLUSION

The Complainants have not provided any legal analysis or reasoned basis to warrant action by the Department to grant the requested relief. Moreover, the Complainants have failed to allege any violations of regulation or statute that would present an actionable legal claim to the Department. In light of these deficiencies, the Department should dismiss the "complaint/petition" without further action.

Respectfully submitted,

BOSTON GAS COMPANY

COLONIAL GAS COMPANY

ESSEX GAS COMPANY

By their attorney,

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Dated: August 10, 2000

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1 The Department's regulations require initial pleadings to identify the statute or regulation under which relief is being sought. See, 220 C.M.R. 1.04(1)(b)7. The Complaint/Petition includes no such references.

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2 In the event that the Department denies the Companies' Motion to Dismiss, the Complainants have failed to allege or demonstrate sufficient grounds for issuing an interim order suspending implementation of the VPI Program pending the Department's proceedings in this matter. See Boston Edison Company, D.P.U. 92-130-A at 7 (1993) ([i]n determining whether a stay is warranted the Department considers: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the



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likelihood that the moving party will be harmed irreparably absent a stay; (3) the prospect that others will be harmed if the Department grants the stay; and (4) the public interest in granting the stay).